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No. 92-1585

In The

Supreme Court of the United States

October Term, 1992

ROBERT J. BURCH,

Petitioner,

-v-

THE TOWNSHIP OF CHATHAM, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT CHARLES KUREBANAS AND SOCRATES KYRITSIS

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RESTATED QUESTIONS PRESENTED FOR REVIEW

1. Whether the case was properly dismissed on the basis of *res judicata* or claim preclusion where the claims had previously been raised, adjudicated, and dismissed, in two related cases, by the Law Division of the Superior Court of New Jersey, affirmed by the Appellate Division of the Superior Court of New Jersey, and in which petitions for certification and reconsideration were denied by the Supreme Court of New Jersey?

2. Whether the case was properly dismissed on the basis of collateral estoppel or issue preclusion where the claims had previously been raised, adjudicated, and dismissed, in two related cases, by the Law Division of the Superior Court of New Jersey, affirmed by the Appellate Division of the Superior Court of New Jersey, and in which petitions for certification and reconsideration were denied by the Supreme Court of New Jersey?

LIST OF PARTIES

The parties in this matter and in the proceedings below are the same and include Robert J. Burch, Petitioner-Plaintiff, and Respondent- Defendants, The Township of Chatham, The Planning Board of Chatham Township, Jeffrey Taylor, Robert Kirkpatrick, Marshall Bissell (deceased), Richard Bradley, Priscilla Beck, Otto Vopelius, Gayle Williams, Donald Malehorn, Charles Kurebanas, and Socrates Kyritisis.

LIST OF COMPANIES PURSUANT TO RULE 29.1

Respondent, The Township of Chatham, is a municipal corporation of the State of New Jersey and neither it nor Respondent, The Planning Board of Chatham Township, has any parent company, subsidiary or affiliate.

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vs.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT CHARLES KUREBANAS AND SOCRATES KYRITSIS

OPINIONS BELOW

By written opinion dated April 23, 1992, the United States District Court for the District of New Jersey dismissed Plaintiff-Petitioner's federal complaint on the basis that the claims set forth therein were barred by *res judicata* or claim preclusion and by

collateral estoppel or issue preclusion. The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court on December 31, 1992. Plaintiff-Petitioner ("Petitioner") seeks review of the Third Circuit's Judgment Order which affirmed the unpublished, written decision of the District Court. [1]

COUNTERSTATEMENT OF THE CASE

Petitioner Robert J. Burch is a resident of the Township of Chatham, New Jersey. On December 15, 1991, Petitioner filed a prolix and somewhat incomprehensible eighteen count (sixty-six page) complaint in the District Court for the District of New Jersey alleging various land use violations and the violation of constitutional and civil rights under 42 U.S.C. §§ 1983, 1985 and 1986. Named as defendants were the Township of Chatham, its Planning Board, the Planning Board attorney, Donald Malehorn, its engineer, Robert Kirkpatrick, the applicant, Socrates Kyritsis, and his attorney, Charles Kurebanas, as well as certain individual Planning Board members.

To the extent comprehensible, the allegations set forth in the federal complaint had been previously pleaded, litigated, and adversely adjudicated against Petitioner in both the trial and appellate courts of the Superior Court of New Jersey in two prior companion cases. The Supreme Court of New Jersey declined to

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1. The District Court's unpublished, written opinion is reproduced in full in Appendix A to this Brief (at Ra1 to 14). The prior unpublished, written opinions of the Superior Court of New Jersey which are both dated March 8, 1991 and which are annexed to the District Court's written opinion are reproduced in full in this Brief as Exhibits B (Ra15 to 19) and C (Ra20 to 23), respectively. The District Court's Order dismissing Petitioner's Complaint is reproduced in Petitioner's Appendix (at Pa3 to 4) and the Judgment Order of the Third Circuit is reproduced in Petitioner's Appendix (at Pa1 to 2). As used herein, "Pb" refers to Petitioner's Brief, "Pa" refers to Petitioner's Appendix, and "Ra" refers to Respondents' Appendix.

grant certification in the companion cases, and denied Petitioner's applications for reconsideration.

Despite taking full advantage of the State judicial process and exhausting his appeals therein, Petitioner combined the adversely adjudicated allegations of both of his State court claims into his federal complaint, referenced the previously adjudicated State court proceedings in his federal complaint, and attempted to relitigate the same claims against the same parties in federal court. The District Court dismissed Petitioner's federal complaint on the grounds of *res judicata* or claim preclusion and collateral estoppel or issue preclusion. (Ra7 to 11). The Third Circuit affirmed the decision of the District Court and entered a Judgment Order. (Pa1 to 2).

The pertinent facts involving this matter and the underlying companion cases were addressed by the District Court and are summarized herein. (Ra2 to 6). On or about June 1, 1987, over Petitioner's objections, the Chatham Township Planning Board granted preliminary approval to the subdivision application filed by Respondent, Socrates Kyritsis. The preliminary approval authorized Kyritsis to construct a proposed residential development (Sycamore Hill) on property adjacent to Petitioner's residential property.

On or about June 15, 1987, Petitioner filed the first of two State court actions against the Respondents, captioned *Burch v. The Planning Board of Chatham Township, et al.*, (Docket No. L-9992-87) (the "subdivision case"). The first three counts of the four count complaint alleged that the Chatham Township Planning Board and its members had violated applicable land use laws and municipal ordinances in approving the development application. The fourth count of the complaint alleged that Petitioner's constitutional and civil rights under 42 U.S.C. § 1983 had been violated by the Respondents.

The trial court dismissed counts one through three of the complaint and remanded the entire development application to the Planning Board due to a defective record.[2] The trial court dismissed the fourth count of the complaint against the individual Planning Board members and representatives because they were immune from Petitioner's 1983 claims as a matter of controlling New Jersey law. The trial court found no violation of Petitioner's constitutional or civil rights by the Township or its Planning Board and entered summary judgment dismissing the remainder of the fourth count.

Despite Petitioner's partial victory in "overturning" the subdivision approval, Petitioner appealed the case. After oral argument, the Appellate Division of the Superior Court of New Jersey issued an unpublished, written opinion wherein the court affirmed the trial court's disposition of the "subdivision" case in all respects. (Ra15 to 19). The Appellate Division specifically reviewed and rejected Petitioner's allegations regarding any violation of his constitutional or civil rights.

The Supreme Court of New Jersey refused to grant certification and denied Petitioner's application for reconsideration.

On April 4, 1988 Petitioner filed his second State lawsuit captioned *Burch v. The Township of Chatham,* (Docket No . MRS-L-1194-88) (the "ordinance case"). Therein, Petitioner challenged

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2. The record (*i. e.*, tapes) from two Planning Board meetings wherein the Kyritis development application was discussed could not be found and was either lost or destroyed, and certain Planning Board members who had voted on the application were unable to certify that they had reviewed the tapes of the Planning Board meetings from which they were absent, thereby violating the requirements of the New Jersey Municipal Land Use Law. N.J.S.A. 40:55D-1 *et seq.*

the validity of an amendment to Chatham Township Land Use Ordinance 2-88, on state law grounds, as well as upon the ground of alleged infringement of Petitioner's constitutional and civil rights. The import of amended zoning ordinance 2-88 was ". . . that the setback requirements for corner lots shall not apply to a lot which becomes a corner lot as the result of a street right-of-way dedication in connection with approval for the development of adjacent land." (Ra22). The effect of Ordinance 2-88 was to save Petitioner's lot (and similarly situated lots) from non-conformity with applicable zoning regulations.[3]

After a three-day trial, the trial court sustained the validity of the amended zoning ordinance, and concluded that Petitioner's constitutional and civil rights had not been violated. Petitioner again filed an appeal.

After oral argument, the "ordinance" case was sustained on appeal in all respects by the Appellate Division of the Superior Court of New Jersey. (Ra20 to 23). The Appellate Division specifically reviewed and rejected Petitioner's allegation that his constitutional and civil rights had been violated. The Supreme Court of New Jersey refused to grant certification and denied Petitioner's application for reconsideration.

Despite the fact that Petitioner's companion State court lawsuits had been adversely adjudicated on the merits at both the trial and appellate levels, Petitioner combined the allegations of both of his State court complaints into the subject federal

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3. The proposed access street to the Kyritsis subdivision was to have been constructed along the easterly boundary of Petitioner's lot and would have converted Petitioner's interior lot into a corner lot. If same was constructed, Petitioner's lot would have fronted on two streets. Ordinance 2-88 prevented Petitioner's lot (and similarly situated lots) from becoming nonconforming with the municipal land use requirements of Chatham Township.

complaint (Pb32, admission of Petitioner), and attempted to circumvent the unfavorable State court adjudications and to relitigate the same issues against the same parties in federal court. The following table provides a shorthand analysis of Petitioner's federal complaint (eighteen counts), as well as the corresponding prior State court complaints (and counts), and the respective State court appellate decisions wherein the same or similar issues were considered and adversely adjudicated against Petitioner.[4]

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4. This table was submitted to the District Court and to the Third Circuit. No objection was made by Petitioner. The table has been modified to reflect the disposition of the companion cases made by the State appellate courts.

FEDERAL COMPLAINT COUNT	DESCRIPTION OF SUBJECT MATTER OF FEDERAL COMPLAINT COUNTS	SUBDIV. SUIT COUNT	ORD. SUIT COUNT	SUBDIV. DECIS.- PAGE	ORD. DECIS.- PAGE
I	Invokes this Court's jurisdiction by alleging violations of Plaintiff's constitutional rights pursuant to 42 U.S.C. § 1983.	1,2,4	3,5	2,4 (Ra16 to 19)	3 (Ra22 to 23)
II	Seeks relitigation of land use issues previously raised, as well as allegation of constitutionally protected property right in the application of a zoning ordinance's setback requirement.	2,4	3,4,5	4 (Ra18 to 19)	3 (Ra22 to 23)
III	Seeks relitigation of zoning issues previously raised.	3,4,5	1,2,3 4,5	4 (Ra18 to 19)	3 (Ra22 to 23)
IV	Seeks relitigation of Plaintiff's objections to Chatham Township's enactment of Ordinance 2-88.	1	3,5	4 (Ra18 to 19)	3,4 (Ra22 to 23)

V	Seeks relitigation of issues raised in both the "subdivision" case, and the "ordinance" case.	4	1,2,3 4,5	3-4 (Ra17 to 19)	3 (Ra22 to 23)	
VI	Seeks to overrule and relitigate the land use and zoning determinations made by the state courts.		2,3,4		3 (Ra22 to 23)	
VII	Seeks to relitigate Plaintiff's claim regarding zoning ordinance 2-88, and the related land use issues.	4	5	4 (Ra18 to 19)	3 (Ra22 to 23)	∞
VIII	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township; and other alleged conduct of defendants.	4	5	3-4 (Ra17 to 19)		

IX	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township in return for alleged favorable treatment.	4	5	3-4 (Ra17 to 19)	
X	Seeks to relitigate Plaintiff's claims of conspiracy between the municipal and private defendants; the payment of $125,000 by Kyritsis to Chatham Township; and other land use issues.	4	5	3-4 (Ra17 to 19)	
XI	Seeks to relitigate the challenge to the subdivision approval, its location and access; and allegations of covert meetings and conspiracy between the municipal and private defendants.	1	1	3-4 (Ra17 to 19)	3 (Ra22 to 23)

XII	Seeks to relitigate the challenge to the subdivision approval, its location and access; and allegations of covert meetings and conspiracy between the municipal and private defendants.	3,4	2	3-4 (Ra17 to 19)	
XIII	Alleges that Planning Board attorney Malehorn conspired with other defendants; and that he made false statements to the Planning Board and to the public in furtherance of the alleged conspiracy.	4		3-4 (Ra17 to 19)	3-4 (Ra22 to 23)
XIV	Alleges that Township Engineer Kirkpatrick conspired with other defendants; and that he made false statements to the Planning Board and to the public in furtherance of the alleged conspiracy.	4		3-4 (Ra17 to 19)	

XV	Alleges covert meetings and conspiracy between the municipal and private defendants.	4		3-4 (Ra17 to 19)	
XVI	Alleges defendants Kyritsis and Kurebanas participated in alleged conspiracy and acceded to Township demands for $125,000 cash payment.	4		3-4 (Ra17 to 19)	
XVII	Alleges suggestions of Morris County Planning Board about sub-division went unheeded by defendants.		5		3-4 (Ra22 to 23)
XVIII	Alleges Plaintiff denied due process at Planning Board, trial and appellate levels by the actions of defendants.	1,2,3,4	1,2,3, 4,5	3-4 (Ra17 to 19)	3-4 (Ra22 to 23)

In all respects, the allegations set forth in Petitioner's sixty-six page federal complaint had been pleaded, raised, and adversely adjudicated against Petitioner in the prior companion State court proceedings. On April 13, 1992, after review of the briefs submitted by all parties and oral argument, the District Court dismissed Petitioner's federal complaint on the ground of *res judicata* or claim preclusion and on the ground of collateral estoppel or issue preclusion. (Ra6 to 11). The Third Circuit affirmed the unpublished, written opinion of the District Court by Judgment Order dated December 31, 1992. (Pa1 to 2).[5]

SUMMARY OF RESPONDENTS' OPPOSITION TO BURCH'S PETITION FOR CERTIORARI

Petitioner has not presented this Court with any substantial issue meriting review. The District Court's dismissal of Petitioner's federal complaint on the grounds of *res judicata* or claim preclusion and collateral estoppel or issue preclusion was affirmed without opinion by the Third Circuit on the basis of the dispositive, written opinion of the District Court. The District Court's decision is in all respects an unremarkable decision, it does not conflict on any point of law with the decision of any other court, and it does not in any other way call for the exercise of this Court's supervisory powers. Rather, Petitioner merely seeks to have this Court review the District Court's factual and legal findings, in which the Third Circuit concurred, and reverse its decision on this ground alone. Because the record is clear that the courts below did not commit any error, let alone a "very obvious and exceptional show[ing] of error," intervention by this Court is

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5. To date, the Sycamore Hill subdivision has not been constructed. Another sudivision application to the Chatham Township Planning Board would apparently be required to permit Respondent, Socrates Kyritsis, to develop or construct a subdivision. Petitioner, of course, would be permitted to object to any development application or approvals sought by Respondent, Socrates Kyritsis.

neither necessary nor appropriate. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *see also, Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS BELOW PROPERLY DISMISSED PETITIONER'S COMPLAINT ON THE BASIS OF *RES JUDICATA* OR CLAIM PRECLUSION BECAUSE THE CLAIMS HAD BEEN PREVIOUSLY ADJUDGED AND DISMISSED BY THE SUPERIOR COURT OF NEW JERSEY IN TWO RELATED CASES.

The District Court properly dismissed Petitioner's federal complaint on the basis of *res judicata* or claim preclusion. (Ra7 to 10). Even though sensitive to the fact that the Petitioner was a *pro se* litigant, the District Court recognized beyond doubt that the Petitioner was attempting to relitigate the same causes of action (against the same parties) which had been previously litigated and adversely adjudicated in two companion cases in the State courts of New Jersey. Indeed, the Petitioner has admitted that his federal complaint is a "consolidation" of his prior state court complaints. (Pb32).

The District Court recognized beyond doubt that Petitioner could demonstrate no legal theory which had not been previously raised and adjudicated in the State court proceedings. (Ra6 to 10); Fed. R. Civ. P. 12(b)(6); *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Nonetheless, after having twice taken full advantage of the State judicial process and exhausting his appeals therein, the Petitioner continues his attempt to circumvent unfavorable final judgments on the merits in the State court proceedings by attempting to relitigate the same claims against the same parties in federal court.

Pursuant to the full faith and credit statute, proceedings within state court " 'shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.' " *Marrese v. American Acad. Ortho. Surgeons,* 470 U.S. 373, 380 (1985) (quoting 28 U.S.C. § 1738). Thus, a federal court should generally " 'give the same preclusive effect to a state court judgment as another court of that state would give.' " *Peduto v. City of North Wildwood,* 878 F.2d 725, 728 (3d Cir. 1989) (quoting *Parsons Steel, Inc. v. First Alabama Bank,* 474 U. S. 518, 523 (1986)). It is equally clear that civil rights actions, instituted pursuant to 42 U.S.C. § 1983, are bound by this rule. *Id.* (citing *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75 (1984) ; *Allen v. McCurry,* 449 U. S. 90 (1980)); *Krison v. Nehls,* 767 F.2d 344, 347-48 (7th Cir. 1985).

Moreover, the full faith and credit statute mandates that the federal court employ the preclusion law of the jurisdiction in which judgment was rendered. *Marrese,* 470 U.S. at 380; *McNasby v. Crown Cork & Seal Co.,* 888 F.2d 270, 271 (3d Cir. 1989), *cert. denied,* 494 U.S. 1066 (1990); *Pittman v. LaFontaine,* 756 F. Supp. 834, 841 (D.N.J. 1991); 1B J. Moore, *Moore's Federal Practice* ¶ 0.406[1], at 272 (2d ed. 1992). The District Court, therefore, properly employed and applied New Jersey law in reaching the conclusion that Petitioner's claims were barred by *res judicata* or claim preclusion. (Ra7).

The Supreme Court of New Jersey recently reviewed the doctrine of *res judicata* in *Watkins v. Resorts Intern. Hotel & Casino,* 124 N.J. 398 (1991). Speaking in terms of claim preclusion[6], and noting that federal law and New Jersey law were

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6. "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Pittman v. LaFontaine,* 756 F. Supp. 834, 841 (D.N.J. 1991) (quoting *McNasby Crown Cork & Seal Co.,* 888 F.2d 270, 275 (3d Cir. 1989) *cert. denied,* 494 U. S. 1066 (1990)).

the same, the court set forth the three basic elements required in New Jersey for claim preclusion or *res judicata*:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. *Federated Dep't Stores v. Moitie,* 452 U. S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103, 108 (1981) ; *In re Energy Coop., supra,* 814 F . 2d at 1230 ; *see Velasquez, supra,* 123 N.J. at 505-06, 589 A.2d at 147, *Roberts v. Goldner,* 79 N.J. 82, 85, 397 A.2d 1090 (1979).

Id. at 412.

In addition, claim preclusion applies to both matters actually determined in the earlier action and to all other relevant matters that could have been so determined. *Id.* (citations omitted). The Petitioner, therefore, in seeking to redress a single wrong, was required to present all legal theories in his initial State action, or the same would be precluded in any subsequent action. *See id.* at 413.

Applying the *Watkins* test, the District Court correctly found that Petitioner was barred from attempting to relitigate his State court claims under the doctrine of *res judicata* or claim preclusion. (Ra8 to 10).

First, there is no doubt that the prior judgments in the companion New Jersey State court proceedings were valid, final and on the merits. Petitioner's claims arising from alleged constitutional and civil rights violations under 42 U.S.C. § 1983, 1985, and 1986, were raised, reviewed, and adjudicated in the State

court proceedings, addressed again on appeal by the Appellate Division, and the Supreme Court of New Jersey twice refused to grant certification to hear the issues.

Contrary to the protestation of Petitioner, it is well-settled that even a judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits, "as fully and completely as if the order had been entered after trial." *Velasquez v. Franz,* 123 N.J. 498, 507 (1991) (citing *Gambocz v. Yelencsics,* 468 F.2d 837 (3d Cir. 1972) (citing *Lawlor v. National Screen Serv. Corp.,* 349 U.S. 322, 327 (1955); *see also,* Fed. R. Civ. P. 41(b); N.J. Ct. R. 4:37-2(d). It is equally clear that a disposition by summary judgment constitutes an adjudication on the merits. *See Peduto v. City of North Wildwood,* 696 F. Supp. 1004, 1008 (D.N.J. 1988), *aff'd,* 878 F.2d 725 (3d Cir. 1989) (citing *Martucci v. Mayer,* 210 F.2d 259, 260-61 (3d Cir. 1954) (applying New Jersey law); *Anster v. Kinolan,* 153 N.J. Super. 52, 56 (App. Div. 1977); Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d, §§ 2712 (at 584) and 2735 (at 445). Moreover, "[u]nder the principles of *res judicata* claims that are actually litigated and determined before trial also are barred from being relitigated." *Id.* at 506.

Applying these principles, the first prong of the *Watkins* test has been satisfied as it is eminently clear that the judgments entered in the companion New Jersey State court lawsuits were valid, final and on the merits. The "subdivision" case was ultimately dismissed by the entry of summary judgment and the "ordinance" case was dismissed by the trial court af ter a three day trial . These dispositions on the merits were affirmed on appeal in all respects.

The second *Watkins* requirement for claim preclusion has also been satisfied because the parties in the earlier companion State actions were identical to or in privity with those in the present action. The third and final requirement of the *Watkins* test has also

been satisfied because the claims in this federal action arose out of the same transaction or occurrence ("subdivision" case and "ordinance" case) as the claims raised and adjudicated against Petitioner in the prior companion State court proceedings.

The Supreme Court of New Jersey has set forth the following considerations to be determined in applying the third *Watkins* requirement:

> To characterize two causes of action as the same for claim preclusion purposes, a court must analyze (1) whether the wrong for which redress is sought is the same in both actions (that is, whether the acts complained of and the demand for relief are the same), (2) whether the theory of recovery is the same, (3) whether the witnesses and documents necessary at trial are the same and (4) whether the material facts alleged are the same.

Pittman, 756 F. Supp. at 841 (citing *Culver v. Insurance Co. of America*, 115 N.J. 451, 460 (1989)); *see also, Wheeler v. Nieves*, 762 F. Supp. 617, 615 (D.N.J. 1991).

Applying these principles, the District Court properly concluded that the third and final requirement of the *Watkins* test had been satisfied:

> Utilizing this test, it is manifest that the alleged wrong for which plaintiff seeks redress is the same alleged wrong that provided the basis of the [companion] state action[s]. Plaintiff merely reasserts that his civil rights were violated, the same act complained of in state court. The relief sought here parallels the relief

> previously requested. Litigation of this claim will certainly require presentation of the same documents and witnesses as the state action[s]. Moreover, plaintiff alleges the same material facts that were the basis of the state proceedings. It is clear that the claim in the present action emanates from the same incident that prompted the initial claim[s]. Accordingly, this claim is barred under the doctrine of *res judicata.*

(Ra10).

The apparent thrust of Petitioner's application to this Court lies in Petitioner's curious claim that he has not had his "day in court." (Pb8, footnote). Petitioner's argument is without merit because he was twice afforded a full and fair opportunity to litigate and did litigate his land use, constitutional, and civil rights claims in the State court proceedings. The State trial and appellate courts adjudicated and rejected Petitioner's claims, and the appellate court twice found no violation or infringement of Petitioner's constitutional or civil rights. The Supreme Court of New Jersey twice refused to grant certification and twice denied reconsideration.

Nonetheless, Petitioner sought to circumvent these adverse adjudications by combining his two State court complaints into the subject federal complaint (Pb32, admission of Petitioner) and by attempting to relitigate the same issues against the same parties in federal court. 42 U.S.C. § 1983, however, "does not allow relitigation of the same issues in federal court." *Peduto*, 878 F. 2d at 729 (quoting *Allen v. McCurry*, 449 U.S. 90, 101 (1980)). Due process does not require that Petitioner have the opportunity to relitigate previously adjudicated claims again in federal court. *Krison*, 767 F.2d at 349. Rather, due process only requires "the

opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The lower courts recognized that Petitioner did in fact litigate the companion State court actions in a meaningful manner at both the trial and appellate levels.

It is abundantly clear that Petitioner has had his "days in court" on the same issues (and against the same parties) involved in this matter. Petitioner is not entitled to yet another bite at the apple to relitigate his previously adjudicated claims in federal court, nor should the taxpayers of the Township of Chatham be compelled to fund the defense of his previously adjudicated, meritless claims.

Finally, to permit Petitioner to maintain this action in federal court would be inconsistent with the rationale underlying *res judicata* or claim preclusion. Fairness demands that this Court put a definite end to this burdensome litigation. *See Reed v. Allen*, 286 U.S. 191, 198-199 (1932). Petitioner's claims have been fully and finally adjudicated on the merits in State court and cannot be relitigated by the parties or their privies. *Id.* Accordingly, the lower courts properly dismissed Petitioner's federal complaint based upon the doctrine of *res judicata* or claim preclusion. (Ra7 to 10, 11).

II.

THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S COMPLAINT ON THE BASIS OF COLLATERAL ESTOPPEL OR ISSUE PRECLUSION BECAUSE THE CLAIMS HAD BEEN PREVIOUSLY ADJUDICATED AND DISMISSED BY THE SUPERIOR COURT OF NEW JERSEY IN TWO RELATED CASES.

" 'Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and

decided.' " *Wheeler v. Nieves*, 762 F. Supp. 617, 624 (D.N.J. 1991) (quoting *McNasby*, 888 F.2d at 275 n. 7 (citation omitted)) . This doctrine requires that later courts respect the first actual decision of a matter that has been actually heard and litigated previously. *Id.* In other words, a plaintiff should not be permitted to relitigate those issues that have been directly determined adversely to him in the State court proceedings. *Id.* at 615.

In order to apply issue preclusion in New Jersey, a court must conclude that:

> (1) the prior court actually litigated and determined the issue; (2) the prior court's judgment was valid and final; (3) the determination of that issue was essential to the prior court's judgment; and (4) the parties in the subsequent action are the same as those in the prior one.

Peduto v. City of North Wildwood, 878 F.2d 725, 727 n.1 (3d Cir. 1989) (citing *City of Plainfield v. Public Service Elec. & Gas Co.*, 82 N.J. 245, 258 (1980); *Charlie Brown of Chatham v. Board of Adjustment*, 202 N.J. Super. 312 (App . Div. 1985)). (Ra10) .

In applying these factors, the District Court properly concluded that each and every element had been satisfied to warrant the application of collateral estoppel or issue preclusion to the claims set forth in the federal complaint. First, the prior companion State court proceedings addressed and adjudicated Petitioner's land use, constitutional, and civil rights claims and found them to be without merit. The Appellate Division twice affirmed the trial court dispositions, and specifically reviewed and rejected Petitioner's claims involving constitutional or civil rights violations. The Supreme Court of New Jersey twice denied Petitioner's applications for certification and for reconsideration.

Second, there is no doubt that the judgments rendered in the prior State court companion cases were valid and final. Third, the State court proceedings specifically addressed and adversely adjudicated Petitioner's claims of constitutional and civil rights violations in reaching their respective judgments. Finally, the parties were identical in both the companion State court proceedings and in this federal action.

Accordingly, the lower courts properly dismissed the federal complaint under the doctrine of collateral estoppel or issue preclusion, because the Petitioner was foreclosed as a matter of law from relitigating in federal court the same previously raised and adversely adjudicated claims. (Ra10 to 11).

CONCLUSION

For the reasons presented herein, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

CARL R. WOODWARD, III
Counsel of Record
WALTER G. LUGER
CARELLA, BYRNE, BAIN,
GILFILLAN, CECCHI & STEWART
Attorneys for All Respondents
Except Charles Kurebanas
and Socrates Kyritsis

APPENDIX A — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED APRIL 23, 1992

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 91-5446

ROBERT J. BURCH,

Plaintiff,

v.

THE TOWNSHIP OF CHATHAM; THE PLANNING BOARD OF CHATHAM TOWNSHIP; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; and SOCRATES KYRITSIS,

Defendants.

OPINION

APPEARANCES:

ROBERT J. BURCH, *pro se*
17 Meyersville Road
Chatham, New Jersey 07928

Appendix A

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Socrates Kyritsis)

BISSELL, *District Judge*

This matter arises on the basis of defendants' motions for dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Defendants Socrates Kyritsis, Charles Kurebanas, and the former Chatham Township officials have each moved for dismissal. As the legal theories underlying the three motions are identical, this Court will consider them together.

Appendix A

Plaintiff *pro se*, Robert J. Burch, is a resident of Chatham Township. Burch filed a civil rights action under 42 U.S.C. §§ 1983, 1985 and 1986,[1] on December 18, 1991, alleging violations of his constitutional rights. In a prolix, eighteen-count complaint, plaintiff essentially avers that defendants conspired to deprive him of his constitutional property rights, through the discriminatory application of a municipal zoning requirement.

Named as defendants in the complaint are the Township of Chatham ("Township"); the Planning Board of Chatham Township (the "Board"); Jeffrey Taylor, former Mayor of Chatham Township; Robert Kirkpatrick, former Township Engineer; Marshall Bissell, member of the Planning Board; Richard Bradley, member and Chairman of the Planning Board; Donald Malehorn, attorney for the Planning Board; Otto Vopelius, Secretary of the Planning Board; Priscilla Beck, member of the Planning Board;

---

1. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985 provides a federal cause of action for persons deprived of rights or privileges under the law as the result of a conspiracy.

Section 1986 provides a federal cause of action against persons having knowledge of and ability to prevent a conspiracy who fail to do so.

Gayle Williams, member of the Planning Board; Socrates Kyritsis, the property owner seeking to develop a lot adjoining plaintiff's property in Chatham Township; and Charles Kurebanas, a former attorney for Mr. Kyritsis.

Ascertaining plaintiff's version of the facts requires arduous distillation of plaintiff's complaint. Prior to filing this action, the plaintiff filed two cases in the New Jersey Superior Court, Law Division, against the same defendants named here. Both cases were decided against plaintiff. In separate appeals, the Appellate Division affirmed the trial court's rulings. Subsequently, the New Jersey Supreme Court denied plaintiff's petitions for certification.

The first of these cases, Appellate Division Docket No. A-4122-89T2, was decided March 8, 1991. Plaintiff challenged the Chatham Township Planning Board's approval of defendant Kyritsis' subdivision application, which had been granted June 1, 1987. Kyritsis sought approval of a plan to construct a residential development (Sycamore Hill) on property adjoining plaintiff's lot.

On June 15, 1987, plaintiff brought suit, setting forth four counts. The first three involved the Board's failure to comply with municipal zoning ordinances. These claims were remanded to the Board for a hearing *de novo,* due to significant deficiencies in the record of the proceedings before the Board, and were eventually dismissed as moot. Plaintiff's fourth claim alleged a violation of the plaintiff's constitutional rights under 42 U.S.C.A. §§ 1983, 1985 and 1986.

The trial court dismissed the federal law claim on summary judgment. The Appellate Division affirmed, finding no discernable violation of plaintiff's civil rights.

In the action currently pending before this Court, plaintiff

asserts that the Superior Court rendered opinions without providing an adequate hearing for plaintiff's claims. In the brief opposing defendants' motion to dismiss, plaintiff attempts to clarify this position, advancing the theory that the Superior Court's summary dismissal of the constitutional violations claim was "based primarily upon defendants' assertion of an 'irredeemably deficient' record before the planning board." Plaintiff argues that due to the state courts' view that the record before the Board was deficient, those courts failed to render a decision on the merits of plaintiff's constitutional claims.

In the second lawsuit filed by the plaintiff, Appellate Division Docket No. A-2323-89T2, plaintiff challenged local Ordinance 2-88, which amended the existing zoning law, as unconstitutional spot zoning. The Ordinance rendered the existing town corner lot setback requirements inapplicable to any lot that became a corner lot as the result of the dedication of a new street right of way. Plaintiff owned a lot adjacent to a proposed right of way. Without the amendment of Ordinance 2-88 to the municipal zoning law, plaintiff's lot would have been rendered a non-conforming corner lot. Plaintiff alleged that this Ordinance arbitrarily deprived him of a property interest in the previously prevailing setback requirement.

The trial court conducted a plenary hearing on October 31, November 2 and November 8, 1989, and entered final judgment against plaintiff on November 24, 1989. The Appellate Division affirmed, nothing that "[t]here is no constitutionally protected property interest in the application of a zoning ordinance's setback requirement." Plaintiff appealed both Appellate Division decisions to the New Jersey Supreme Court, which denied plaintiff's petitions for certification on July 9, 1991.

Plaintiff continues to advance the theory that by amending the

municipal zoning ordinance, defendants' violated his constitutionally protected property interest and denied him equal protection of the laws. Additionally, plaintiff maintains that his claims of civil rights violations were not adjudicated on the merits in the state court proceedings. For convenient reference, the texts of both Appellate Division opinions are annexed hereto as Exhibits A and B.

DISCUSSION

The standard for withstanding a motion to dismiss under Rule 12(b)(6) is not a difficult one to meet. "While a complaint should not be dismissed unless the court determines that the allegations do not support relief on any legal theory, the complaint nonetheless must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." *District of Columbia v. Air Florida*, 750 F.2d 1077, 1078 (D.C. Cir. 1984). Similarly, "[i]t is axiomatic that, to withstand a motion to dismiss, a plaintiff is not required to provide evidence of or prove the truthfulness of his complaint." *Quinones v. Szorc*, 771 F.2d 289, 291 n.3 (7th Cir. 1985).

A complaint drafted by a *pro se* litigant must be liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520 (1971), and *pro se* submissions "must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), *reh'g denied*, 429 U.S. 1066 (1977) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1971), *reh'g denied*, 405 U.S. 948 (1972)): *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *on reh'g*, *Gillespie v. Crawford*, 833 F.2d 47, 49 (5th Cir. 1987), *on reh'g*, 853 F.2d 1101 (5th Cir. 1988) (*en banc*).

When reviewing a *pro se* complaint, a court must assume plaintiff's factual allegations to be true and construe his claim

liberally. *Neitzke v. Williams*, 490 U.S. 319, 330 n.9 (1989); *Roman v. Jeffes*, 904 F.2d 192, 197 (3d Cir. 1990). In deciding whether to dismiss a *pro se* complaint it must "appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. Therefore, on a motion to dismiss a complaint drafted by a *pro se* litigant, the complaint must be given even more leeway than the very liberal standards for withstanding a motion to dismiss a complaint drafted by an attorney.

While thus obliged to construe a litigant's *pro se* complaint liberally, a court may not bend the law in his favor. The Full Faith and Credit Act, 28 U.S.C. § 1738, mandates that state court proceedings " 'shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' " *Marrese v. American Acad. Ortho. Surgeons*, 470 U.S. 373, 380 (1985) (quoting 28 U.S.C. § 1738). This standard has been applied in civil rights actions filed under 42 U.S.C. § 1983. *Peduto v. City of North Wildwood*, 878 F.2d 725, 728 (3d Cir. 1989) (citing *Miara v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 74 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980)). Additionally, under this statute, federal courts are to "refer to the preclusion law of the State in which judgment was rendered," *Marress*, 470 U.S. at 380, and are not to "employ their own rules of res judicata in determining the effect of state judgments." (*Id.*, quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982)). Utilizing these principles, New Jersey law must be examined in resolving the preclusion controversy presented here, that is, whether plaintiff's claims are precluded because of the foregoing judgments in state court.

The New Jersey Supreme Court has often employed the doctrine of *res judicata*, which generally provides that "[a] cause

of action once finally determined between parties on the merits by a tribunal having jurisdiction cannot be relitigated by those parties . . . in a new proceeding." *Roberts v. Goldner*, 79 N.J. 82, 85 (1979) (citations omitted). The Court has refined and elucidated the elements of this doctrine, particularly in the recent decision *Watkins v. Resorts Intern. Hotel & Casino*, 124 N.J. 398 (1991). In *Watkins*, the Court noted that federal law and New Jersey law both require three basic elements:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

(*Id.* at 412 (citing *Federated Stores v. Moitie*, 452 U.S. 394, 398 (1981).

The *Watkins* Court also explained that *res judicata* or claim preclusion applies to all relevant matters that *could* have been determined in a prior action, not merely those matters actually decided. (*Id.*, citing *Angel v. Bullington*, 330 U.S. 183, 192-93 (1947); *Culver v. Insurance Co. of North America*, 115 N.J. 451 (1989)). A litigant seeking redress for a single wrong must present all legal theories in the initial action, or they will be precluded in any subsequent action. (*Id.* at 413) (citations omitted).

Applying the first prong of the *Watkins* multi-factored test to the case at bar, it is clear that the judgments entered in the New Jersey state courts were valid, final and on the merits. Plaintiff's civil rights claims were dismissed on summary judgment by the trial court, and this ruling was specifically addressed and affirmed

by the Appellate Division. This judgment meets the *Watkins* test, as "[a] judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.' " *Velasquez v. Franz*, 123 N.J. 498, 507 (1991) (citations omitted).

The second prong of this test is also met, as the parties in the instant case are identical to the parties in the antecedent state action.

The final prong under the *Watkins* claim preclusion analysis concerns whether the claim in the subsequent action emanates from the same incident that prompted the initial claim. Application of this prong is not simple, and requires a four-point analysis in which the court must consider:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions) *Gissen v. Tackman*, 401 F. Supp. 310, 312 (D.N.J. 1975); (2) whether the theory of recovery is the same; (3) whether the witnesses and the documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first) *O'Shea v. Chrysler Corporation*, 206 F. Supp. 601, 605 (D.N.J. 1962); and (4) whether the *material* facts alleged are the same. *United States v. Athlone Industries Inc.*, 746 F. Supp. 977, 984 (3d Cir. 1984).

Culver v. Insurance Co. of North America, 115 N.J. 451, 461-62 (12989) (emphasis in original).

Utilizing this test, it is manifest that the alleged wrong for which plaintiff seeks redress is the same alleged wrong that provided the basis of the state action. Plaintiff merely reasserts that his civil rights were violated, the same act complained of in state court. The relief sought here parallels the relief previously requested. Litigation of this claim will certainly require presentation of the same documents and witnesses as the state action. Moreover, plaintiff alleges the same material facts that were the basis of the state proceedings. It is clear that the claim in the present action emanates from the same incident that prompted the initial claim. Accordingly, this claim is barred under the doctrine of *res judicata.*

Plaintiff's claim is also barred under the doctrine of issue preclusion or collateral estoppel. " 'Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.' " *Wheeler v. Nieves,* 762 F. Supp. 617, 624 (D.N.J. 1991) (citations omitted). A plaintiff will not be permitted to relitigate issues that have been directly addressed in prior proceedings. (*Id.* at 615).

Issue preclusion is warranted if a court concludes that

> (l) the prior court actually litigated and determined the issue; (2) the prior court's judgment was valid and final; (3) the determination of that issue was essential to the prior court's judgment; and (4) the parties in the subsequent action are the same as those in the prior one.

Peduto v. City of North Wildwood, 878 F.2d 725, 727 n.1 (3d Cir. 1989) (citing *City of Plainfield v. Public Service Electric & Gas Co.,* 82 N.J. 245, 258 (1980); *Charlie Brown of Chatham v. Board*

of Adjustment, 202 N.J. Super. 312 (App. Div. 1985)).

These criteria are all satisfied in the case at bar. The state court addressed plaintiff's assertions of civil rights allegations, and found them to be meritless. The court did not, as plaintiff maintains, fail to adjudicate these allegations due to a deficient record before the planning board. Rather, the court granted summary judgment, and declared that plaintiff failed to present evidence sufficient to support a finding that the alleged civil rights violations actually occurred.

Furthermore, it is evident that the state court's judgments were final and valid. The civil rights claims were addressed at both the trial and appellate levels, and found to be meritless. These claims were essential to the plaintiff's state action, and the parties in this action are the same as those in the state action. Consequently, plaintiff's claim is barred under the doctrine of collateral estoppel.

It is indisputable from the facts set forth in plaintiff's complaint, and from the record in the state proceedings, that the claims advanced by the plaintiff have already been adjudicated in state court. Specifically, plaintiff's allegations of civil rights violations were directly addressed by both the trial court and the appellate court, and found to be without merit. As a result, plaintiff's claims are barred from consideration in this court under the parallel doctrines of *res judicata* and collateral estoppel.[2]

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2. Plaintiff asserts that jurisdiction in this court, as to all counts, is based upon 42 U.S.C. § 1983. (Compl., ¶ 1 and *passim*). Some counts as phrased appear to plead claims cognizable (it [sic] at all) only under state law. Because they either were or could have been raised in the prior Superior Court suits, plaintiff is barred from raising them belatedly in the present action. Alternatively, such state claims are subject to dismissal for lack of pendent jurisdiction due to the dismissal of all federal claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Appendix A

Defendants' motion to dismiss is accompanied by a request to enjoin plaintiff from further pursing this litigation, and to impose sanctions to penalize plaintiff for "needlessly wasting judicial resources and the taxpayer's money." Therefore, this Court must analyze plaintiff's complaint to determine whether Rule 11 sanctions are warranted.[3]

"Rule 11 sanctions may be imposed 'in the exceptional circumstance' where the claim or motion is patently unmeritorious or frivolous." *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988) (citing *Giardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987); *see also Dura Systems. Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 556 (3d Cir. 198); *Mary Ann Pensiero Inc. v. Lingle*, 847 F.2d 90, 99 (3d Cir. 1988)). The requirement that an attorney engage in a reasonable inquiry as to both the facts and the law was "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." (Fed. R. Civ. P. 11 (advisory committee notes); *see also Dura Systems*, 886 F.2d at 556).

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3. Fed. R. Civ. P. 11 provides, in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

Appendix A

Rule 11 sanctions are proper only in situations involving a signed pleading or other paper. *Schering Corp. v. Vitarine Pharmaceutical. Inc.*, 889 F.2d 490, 496 (3d Cir. 1989) (citations omitted). In addition, the proper focus is on the circumstances that existed at the time counsel filed the challenged paper. (*Id.*) "The wisdom of hindsight is to be avoided; the attorney's conduct must be judged by what was reasonable to believe at the time the pleading, motion, or other paper was submitted." (*Id.*)

The Third Circuit has also cautioned that "[l]itigants misuse the Rule when sanctions are brought against a party whose only sin was being on the unsuccessful side of a ruling or judgment." *Giardo*, 835 F.2d at 483; *see also Dura Systems*, 886 F.2d at 556; *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-41 (9th Cir. 1986) (district court may not impose sanctions simply because party's nonfrivolous argument is found by the district court to be unjustified). Furthermore, the fact that an argument is self-serving does not make it rise to the level of becoming "patently unmeritorious or frivolous." *See Dura Systems*, 886 F.2d at 557.

The United States Supreme Court recently considered the scope of a court's jurisdiction to impose sanctions even after a plaintiff voluntarily dismisses a complaint. The Court stated that

> the central purpose of Rule 11 is to deter baseless filings in District Court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts. See Advisory Committee Note on Rule 11, 28 U.S.C. App., p. 576 [USCS Court Rules, Fed. Rules of Civ. Proc., Notes following Rule 11]. Rule 11

> imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and "not interposed for any improper purpose."

Cooter & Geil v. Hartmarx Corp., __ U.S. __, 110 L. Ed. 2d 359, 375 (1990).

Applying these principles to the case at bar, it does not currently appear that the imposition of sanctions or the issuance of an injunction against further litigation are warranted. Although sanctions may be imposed on *pro se* litigants, *see Calesnick v. Redevelopment Auth. of Philadelphia*, 696 F. Supp. 1053, 1056 (E.D. Pa. 1988), plaintiff Robert Burch has not yet demonstrated the obstinacy in pursuing his failed claim that the *Calesnick* plaintiff displayed. Burch's complaint and responsive pleadings indicate that his actual belief, though erroneous, was that the state court never properly addressed his civil rights claim. Thus, although the complaint is clearly barred under the doctrines of *res judicata* and collateral estoppel, it is not so patently unmeritorious as to justify the imposition of sanctions.

CONCLUSION

For the foregoing reasons, plaintiff's complaint is dismissed.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: April 23 , 1992

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MARCH 8, 1991 AT DOCKET NO. A-4122-89T2

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4122-89T2

ROBERT J. BURCH,

Plaintiff-Appellant,

v.

THE PLANNING BOARD OF CHATHAM TOWNSHIP; THE TOWNSHIP OF CHATHAM; JEFFREY TAYLOR; ROBERT KIRKPATRICK; MARSHALL BISSELL; RICHARD BRADLEY; PRISCILLA BECK; OTTO VOPELIUS; GAYLE WILLIAMS; DONALD MALEHORN; CHARLES KUREBANAS; SOCRATES KYRITSIS,

Defendants-Respondents.

Argued February 20, 1991 — Decided March 8, 1991

Before Judges Antell and Keefe.

On appeal from Superior Court, Law Division, Morris County.

Robert J. Burch argued *pro se*.

Appendix B

Daniel S. Bernstein argued the cause for respondents Planning Board of Chatham Township; Township of Chatham; Jeffrey Taylor; Robert Kirkpatrick; Marshall Bissell; Richard Bradley; Priscilla Beck; Otto Vopelius; Gayle Williams and Donald Malehorn (Bernstein & Hoffman, attorneys; Mr. Bernstein and Micah N. Kroloff, on the brief).

John C. Kennedy argued the cause for respondent Kurebanas (O'Donnell, Kennedy, Vesple & Piechta, attorneys; Mr. Kennedy, of counsel and on the brief).

Edward F. Broderick, Jr., argued the cause for respondent Kyritsis (Broderick, Newmark & Grather, attorneys; Mr. Broderick and Louis Mondello, on the brief).

PER CURIAM

This appeal is companion to that considered under Docket No. A-2323-89T2. The statement of background factual material set forth in our decision on that appeal filed contemporaneously herewith is incorporated herein and made a part hereof by reference.

In January 1986, defendant Socrates Kyritsis applied for subdivision approval of Lot 42, a 9.41 acre parcel located on Block 38 on the municipal tax map. The parcel is located between Meyersville Road and Fairmount Avenue, behind plaintiff's property, Lot 41, in Chatham Township. The purpose of his

application was to construct a residential development to be known as "Sycamore Hill." The Chatham Township Planning Board held public meetings on the application on May 5, 19, September 15, October 20, November 17 and December 15, 1986, March 2, June 1 and 15, 1987. On June 1, 1987, the Board granted preliminary major subdivision approval, memorialized by written resolution dated June 15, 1987.

On June 15, 1987, plaintiff brought this suit in lieu of prerogative writ. His amended complaint, filed October 22, 1987, was framed in four counts. The first three counts challenged the Board's preliminary approval for failure to conform with municipal ordinances. The fourth count sought monetary damages from all defendants on the claim that they had violated plaintiff's constitutional rights, contrary to 42 *U.S.C.A.* §§ 1983, 1985 and 1986. Named as defendants were the Township of Chatham, its Planning Board, the Planning Board attorney, Donald Malehorn, its engineer, Robert Kirkpatrick, the applicant, Socrates Kyritsis, and his attorney, Charles Kurebanas, and each individual member of the Planning Board who voted in favor of the subdivision.

Recognizing that significant deficiencies existed in the record of the proceedings before the Planning Board, the matter was remanded at defendants' request to the board for a hearing *de novo* and the first three counts of the amended complaint were dismissed as moot. The fourth count was dismissed on summary judgment for failure of plaintiff to demonstrate any genuine issue of material fact to support his claim that his constitutional rights had been violated. Plaintiff now appeals from that determination.

The basis of plaintiff's civil rights action lies in the fact that the subdivision approval was granted over plaintiff's objections. Plaintiff asserts that the approval came about as the result of a

conspiracy among the defendants whereby Kyritsis would pay the Township $125,000. The facts underlying the alleged conspiracy can be briefly stated. The original subdivision plans envisioned the installation of detention basins to accommodate drainage flow from the steep slopes at the far end of the tract along Fairmount Avenue where Sycamore Hill would have approximately 400 feet of frontage. The anticipated cost of the basins was approximately $125,000. After the plans had been submitted and reviewed it was discovered that the Township was considering the reconstruction of Fairmount Avenue and the installation of drainage improvements for the benefit of the entire area. As we understand it from the record, the Township determined to substitute a larger diameter pipe with increased flow rates so that it would accommodate not only the area as it then existed, but with the new development in place as well. The anticipated cost of the substitution to the township was to be approximately $10,000. However, since Kyritsis would then be able to tie into the municipal system, thereby saving approximately $125,000, he agreed to pay that sum to the municipality. We find nothing in the record to support a different version of that transaction.

We discern no infringement of plaintiff's civil rights or any damage to plaintiff resulting from defendants' conduct. His property has not been diminished in value and the fact that the changed landscape will be less to his liking is not a redressible injury.

We note in particular that under our decision in *Anastasio v. Planning Bd. of Tp. of West Orange*, 209 *N.J. Super.* 499 (App. Div.), *certif. denied*, 107 *N.J.* 46 (1986), defendants who are being sued in their individual capacities as members of the Planning Board are absolutely immune from liability in actions brought under 42 *U.S.C.A.* § 1983.

Appendix B

It has long been recognized that the summary judgment procedure

> is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.

Judson v. Peoples Bank & Trust Co. of Westfield, 17 *N.J.* 67, 74 (1954). As the Supreme Court noted in *Robbins v. Jersey City*, 23 *N.J.* 229, 241 (1957), the summary judgment procedure affords protection "against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention."

The summary judgment dated February 26, 1988, is affirmed substantially for the reasons stated by Judge Stanton for the Law Division in his oral opinion of the same date.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MARCH 8, 1991 AT DOCKET NO. A-2323-89T2

NOT FOR PUBLICATION WITHOUT THE
APROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2323-89T2

ROBERT J. BURCH,

Plaintiff-Appellant,

v.

THE TOWNSHIP OF CHATHAM

Defendant-Respondent.

Argued February 20, 1991 - Decided Before Judges Antell and Keefe.

On appeal from Superior Court, Law Division, Morris County.

John Anthony Lombardi argued the case for appellant (Robert J. Burch, *pro se*, on the brief).

Daniel S. Bernstein argued the cause for respondent (Bernstein & Hoffman, attorneys; Mr. Bernstein and Micah N. Kroloff, on the brief).

Appendix C

PER CURIAM

This appeal is companion to that considered under Docket No. A-4122-89T2.

Plaintiff is the owner of Lot 41 on Block 38 in the Township of Chatham. The lot has a frontage on Meyersville Road of 108 feet and a depth of 300 feet. To the south, immediately behind plaintiff's lot, is Lot 42, the subject of a development application by Socrates Kyritsis. A 57.7-foot wide extension (the "staff") of Lot 42 runs out from behind plaintiff's lot along its easterly side for approximately 270 feet to Meyersville Road. As part of the development project, Kyritsis proposed to install within the staff a 50-foot wide roadway to be known as Sycamore Drive, which would provide access to the interior development from Meyersville Road. The effect of this would be to transform plaintiff's lot into a corner lot. The Chatham ordinance requires that structures on corner lots conform with front yard setback requirements with respect to both abutting streets so that corner lot structures will be in line with all other structures on both streets. Although plaintiff's house now meets township sideyard requirements for non-corner lots, the installation of Sycamore Drive would convert it into a nonconforming structure. Its actual setback on the new street would be only around 34.89 feet and would fail to satisfy the 50-foot front yard/side yard setback requirements for corner lots.

Efforts were made by Kyritsis to meet plaintiff's objections to the change of his lot into a nonconforming use. Since only 50 feet of the 57.7-foot wide staff were required for the Sycamore Drive right-of-way, one solution proposed was to convey the excess 7.7 feet to plaintiff, thereby increasing his setback on Sycamore Drive to 42.59 feet. Another possible solution was to subdivide the 7.7-

foot wide strip into a separate lot which would lie between plaintiff's lot and Sycamore Drive. Although such a lot would be unusable, it would avoid making plaintiff's lot into a corner lot subject to 50-foot setback requirements on both abutting streets.

Neither proposal was acceptable and the situation was ultimately resolved by the Township through the enactment of Ordinance 2-88. The import thereof is that the setback requirements for corner lots shall not apply to a lot which becomes a corner lot as the result of a street right-of-way dedication in connection with approval for the development of adjacent land. This exception to the setback requirements is contingent upon the dedication occurring after the erection of a principal structure on the lot. The effect of this, obviously, is to save plaintiff's lot from nonconformity.

Plaintiff brought this action in lieu of prerogative writ to invalidate Ordinance 2-88. He challenges the ordinance as being "arbitrary, unreasonable and capricious, and as discriminatory spot zoning which takes private property without due process. . . ." Plaintiff insists that his right to the requirement of a side yard setback from Sycamore Drive of the same distance as all other corner lots in the community is inviolate, and that Kyritsis be required to install Sycamore Drive so as not to infringe upon plaintiff's claimed property interest in the prevailing setback requirement.

After a plenary hearing conducted on October 31, November 2 and November 8, 1989, a final judgment was entered November 24, 1989, in favor of defendant and against plaintiff. Plaintiff appeals.

We find no merit to the premise of plaintiff's suit. There is no

constitutionally protected property interest in the application of a zoning ordinance's setback requirement. In our view, the Township's determination to render corner lot setback requirements inapplicable to lots anywhere in the municipality which become corner lots under the circumstances here presented is a legitimate exercise of legislative power not subject to judicial superintendence.

We affirm substantially for the reasons stated by Judge Stanton in his oral opinion for the Law Division dated November 9, 1989.